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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY TERRY,

Defendant and Appellant.

A152524

(Sonoma County
Super. Ct. No. SCR652649)

Jimmy Terry argues the court abused its discretion when it (1) granted his pretrial motion under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) to represent himself at trial; and (2) denied his mid-trial request for an attorney. Terry also contends his sentence for possession of a firearm as a felon should have been stayed under Penal Code section 654¹ and that the matter must be remanded for the trial court to consider striking firearm enhancements under recent amendments to sections 12022.5 and 12022.53. None of these contentions has merit. We modify the judgment to correct sentencing errors acknowledged by both parties and affirm the judgment as modified.

BACKGROUND

The following facts, which are not in dispute, are as stated in the prosecutor's sentencing brief. Twelve days after he was released on parole to his home in Oakland, Terry "and his co-participant, Johnny Tasker Douglas, Jr. (Douglas), also from the Oakland area, drove a stolen Ford Mustang convertible into the parking lot of the Yulupa Shopping Center in Santa Rosa, CA. Defendant was armed with a loaded operable

¹ Further statutory citations are to the Penal Code.

revolver and was wearing a mask and hat. Douglas was wearing a wig, and was carrying a bag and metal pry-bar.

“The two men exited their vehicle, which was parked only a few feet from the entrance to the Bennett Valley Jewelers, a shop specializing in high end jewelry and watches, and walked directly into the jewelry store. Defendant, the first one through the door, immediately pointed his revolver at [Suzanne],² a customer service representative who was sitting at a desk inside the store. Defendant walked directly to [Suzanne], jumping over the display cases situated between [Suzanne] and himself.

“Douglas entered immediately after Defendant. As he entered the store, he turned to the left and headed directly to the display cases housing the store’s Rolex watches. Using the pry-bar he brought, Douglas smashed the glass in the cases and began to fill a bag with Rolex watches.

“Once Defendant reached [Suzanne], he grabbed her and pointed his revolver at her. As defendant held [Suzanne], the store co-owner [Tyrone] emerged from his office behind [Suzanne’s] desk to see what the commotion was about. [Tyrone] was armed with his semi-automatic pistol, which he kept in his desk at the store for protection. When Defendant saw [Tyrone], he pointed his revolver at [Suzanne’s] head and yelled that he would shoot [Suzanne] if [Tyrone] did not put his gun down. [Tyrone] responded by pointing his pistol back at Defendant and ordering him to drop his gun.

“Defendant began to alternate pointing his revolver at [Suzanne’s] head and at [Tyrone], while yelling at [Tyrone] to drop his gun or he would shoot [Suzanne]. While yelling and pointing his gun, Defendant began to move from his location at [Suzanne’s] desk around the store and toward the exit. As he moved, Defendant forced [Suzanne] to move with him by wrapping his arm around her torso and keeping a grip on the underwire portion [of] her bra. As Defendant moved toward the exit, he positioned himself behind [Suzanne] so that [Tyrone] would not have a clear shot at him. Using this method, Defendant moved himself and [Suzanne] the complete length of the jewelry

² We will refer to the victims by their first names in the interest of privacy. We intend no disrespect by this practice.

store counter until he backed into the small gated doorway between the store employee area and the customer area. Unable to navigate the gate without turning away from [Tyrone] or releasing [Suzanne], Defendant hunkered down behind [Suzanne] and continued to alternate pointing his gun at [Tyrone and Suzanne].

“While Defendant was moving from [Suzanne’s] desk to the gate, [Tyrone] noticed Douglas taking watches from the Rolex case. Unsure if Douglas was also armed with a gun, [Tyrone] quickly discharged two rounds from his gun, hitting Douglas with both. Douglas dropped the bag with the watches inside, as well as his pry-bar, and fell to the ground. Once on the ground, Douglas crawled to the doorway of the store, where he got to his feet and ran to the stolen Mustang. Without waiting for Defendant, Douglas got into the Mustang and quickly drove away from the scene.

“As [Tyrone] discharged his pistol at Douglas, Defendant began firing at [Tyrone] an exchange of gunfire occurred between Defendant and [Tyrone]. Defendant discharged all five rounds in his revolver at [Tyrone], narrowly missing him with at least two of the five shots. Defendant was hit four times during the exchange. Throughout the exchange, Defendant held [Suzanne] captive as a human shield between himself and [Tyrone].

“When he ran out of ammunition, Defendant threw down his gun and began to climb over the display cases to get to the door. [Tyrone] continued to point his gun at Defendant, yelling for him to get to the ground, but Defendant ignored his commands and continued toward the door. [Tyrone] fired one more round at Defendant, who was hit again, but able to continue toward the exit. Defendant ran from the store to the middle of the Yulupa Shopping Center parking lot, where he collapsed. He was then restrained by an off-duty police officer who heard the shots while having lunch nearby. Defendant was arrested and taken to Memorial Hospital where he was treated for multiple gunshot wounds.

“[Suzanne] was found on the floor of the jewelry store where Defendant left her. She was bleeding from two gunshot wounds, one to each of her arms. She was taken to Memorial Hospital where she was treated. At the time of the trial, she testified that she

suffered extreme pain from her injuries, had extensive scarring, and continued to suffer physical and psychological harm despite the robbery occurring several years ago.

“The Mustang was eventually located a short distance away, with blood on several areas of the interior. Douglas was later apprehended in Oakland, after receiving treatment for multiple gunshot wounds.

“The Rolex watches were all recovered at the scene though several were damaged during the incident.”

Terry was charged with kidnapping for robbery (count 1), attempted murder (count 2), two counts of second-degree robbery (counts 3 and 4), two counts of assault with a firearm (counts 5 and 6), and possession of a firearm by a felon (count 7), with various firearm enhancement allegations. The information also alleged four prior strike offenses, four serious felonies and two prior prison terms. In August 2016 a jury found Terry competent to stand trial. In April 2017 he was convicted of all counts except attempted murder, on which the jury was unable to reach a verdict. The associated enhancement allegations were found true. Terry was sentenced to a term of 82 years plus 77 years to life in prison. This appeal is timely.

DISCUSSION

I. The Court Properly Granted Terry’s *Faretta* Motion

Terry contends the court erred when it granted his *Faretta* motion because it was unaware it had the discretion to deny the request if it found he was not competent to represent himself. He is mistaken.

A. Background

On August 19, 2016, a jury found Terry competent to stand trial.³ Trial on the substantive charges was set for November 17, 2016, then continued to January 13, 2017. On January 11, 2017, Terry told the court he wanted to represent himself because he “can do a better job than” his appointed lawyer. The court cautioned Terry that he was facing a potential life term, that he would be held to the same standards as an attorney, and that

³ Terry was represented by counsel at his competency trial.

the court would not be able to assist him. Terry said he understood and that he was ready to start trial.

The prosecutor advised the court, “I believe there is a right to represent yourself, there are certain limitations on that right. There are times in which the Court can deny a request to represent[.]” The court replied, “I just don’t have those,” presumably referring to case authorities. The prosecutor said he did not have them either but wanted an opportunity to review them before the court ruled. The court stated it would research the limitations on the right to self-representation and passed the matter until later that afternoon.

After a break in the proceedings, the court reviewed Terry’s *Faretta* waiver form and questioned him further about his understanding, ability and readiness to represent himself at trial. The prosecutor indicated he also would research “what discretion the Court has to deny the request.” The court replied, “all right [*sic*], well I’m going to give [the prosecutor] an opportunity to look at the legal authorities related to this subject and there is a good discussion at sections 3.7 of the CEB book. 3.7 and 3.8. One of the things that the Court looks at is whether there is a knowing and voluntary waiver. I think you are making the point clearly, I believe you are fully competent to make the decision to represent yourself.” The court told Terry, “[t]he practice book says the Court should generally not allow self-representation if the motion is made on the first day of trial. We are two days out, and I want, between now and this afternoon I want you to give some serious thought to whether you think this is a good idea. Because that’s a big step to be responsible for all the legal process that’s going on in the case.” Terry repeated he was ready for trial.

The matter was passed for about two hours. After the break, Terry reconfirmed that he understood the court’s admonishments and wanted to represent himself. The court said, “I need to make sure you especially understand this point. If I give you the opportunity to represent yourself you can’t—we cannot get into trial and have you change your mind. Once you make this decision and once I make the decision to allow you to do this, then it is done, and you can’t—I can’t stop the trial and start all over again

with a lawyer. So this is a very important question that you need to be comfortable with before I make the decision, because once I make it and we go down the track, it is not something that can be undone once we start trial.” Terry confirmed that he understood and was ready to start trial right away.

The prosecutor observed that Terry’s request appeared to be knowing, intelligent and voluntary. He then summarized the proceedings as follows. “It appears to me that the Court has had several colloquies with Mr. Terry. Mr. Terry has filled out a multiple-page form. Mr. Terry appears to have followed along with the Court throughout the colloquy, he has answered appropriately, he has comported himself correctly within the proceedings. We are all aware because we ran the jury trial on his competence that Mr. Terry has some mental health concerns, but those in and of themselves do not disqualify him from making this kind of request. As long as the Court can find that he appears to be competent to stand trial and understands the request that he’s making, then it is appropriate for him to make a request and the Court to grant it. I would like the record to reflect that throughout the colloquy it does appear as if he is fully competent to understand what’s being asked of him and to continue to comport himself accordingly through the trial. And I am not aware of any issues or concerns with regard to his present competence at this point.”

The court agreed with the prosecutor’s assessment. It observed that Terry had “not done anything inappropriate at any time during the course of all the proceedings we’ve had over a long period of time. Including the jury trial related to your competency. I am confident that you are competent, that you understand the proceedings. I also believe that in looking at what I know about you, this isn’t the first time you’ve been in a courtroom. You’ve had some time in courts over the course of your adult life, and this is not something that is unfamiliar to you. I don’t know if you’ve ever represented yourself in any previous proceedings, but you have been through the process a couple of times. Including the jury trial that we had a few months ago. [¶] . . . [¶] So I have to find that you are able to make the decision[,] that you are making it freely and voluntarily, and that it is timely. I believe because we haven’t started the process and it will not delay

proceedings, that it is timely. I am close to making the call that you are able to represent yourself.”

The court further observed that “it is reversible error per se to not allow someone to represent themselves when they’ve made a timely request and they are waiving their rights freely and voluntarily. There is more downside to my not granting this motion than to granting it.” The prosecutor concurred, and observed that Terry’s attorney had not raised any issues as to Terry’s “fitness or mental well-being in order to proceed pro se.” After again confirming that Terry wished to represent himself and was comfortable doing so, the court granted his request.

B. Analysis

A defendant in a criminal case has the right to represent himself under the Sixth Amendment to the United States Constitution. (*Faretta, supra*, 422 U.S. at pp. 818-832.) The “autonomy and dignity interests” that underlie this right are not defeated by “the fact or likelihood that an unskilled, self-represented defendant will perform poorly in conducting his or her own defense. . . .” (*People v. Mickel* (2016) 2 Cal.5th 181, 206 (*Mickel*)). A self-represented defendant need not meet the standards of an attorney or even be capable of conducting “an effective defense.” (*Ibid.*) The courts have “accepted that the cost of recognizing a criminal defendant’s right to self-representation may result ‘ “in detriment to the defendant, if not outright unfairness.” ’ ” (*Ibid.*) Thus, a defendant’s right to control his defense includes the right to decide to present no defense, or a defense that has little or no chances of success. (*Id.* at p. 209.)

A defendant also has the constitutional right not to be subject to a criminal trial while he or she is mentally incompetent. (*In re R.V.* (2015) 61 Cal.4th 181, 188.) Mental competence in this context means that the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and also has “a rational as well as factual understanding of the proceedings against him.” (*Dusky v. United States* (1960) 362 U.S. 402; see Pen. Code, §§ 1367, 1368.)

In *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*), the United States Supreme Court recognized that some defendants suffer from “a mental condition that falls in a gray

area between [the] minimal constitutional requirement that measures a defendant’s ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose,” that is, self-representation. (*Id.* at p. 172.) The *Edwards* court held that states may, but need not, deny self-representation to “gray-area defendants”—those defendants who are competent to stand trial but lack the mental health or capacity to represent themselves. (*Id.* at p. 174.) Under *Edwards*, states may deny self-representation to those who are competent to stand trial, but who “suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.” (*Id.* at p. 178.)

Four years later the California Supreme Court held that trial courts “may deny self-representation in those cases where *Edwards* permits such denial.” (*People v. Johnson* (2012) 53 Cal.4th 519, 528 (*Johnson*).) *Johnson* explains that, under *Edwards*, competence to represent oneself at trial is best described as “the ability ‘to carry out the basic tasks needed to present [one’s] own defense without the help of counsel.’ ” (*Id.* at p. 530.) Those basic tasks may include “organization of defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury.” (*Edwards, supra*, 554 U.S. at p. 176, italics omitted.) This is a “higher standard of mental competence . . . than for competency to stand trial.” (*Johnson, supra*, 53 Cal.4th at p. 527.)

Relying on *People v. Shiga* (2016) 6 Cal.App.5th 22 (*Shiga*), Terry argues the trial court was unaware of its discretion under *Johnson* and *Edwards* to deny his *Faretta* request if it found he was not competent to represent himself. Instead, he asserts, the court’s comments on the record show its ruling was premised on the mistaken belief that a defendant found competent to stand trial necessarily has the right to self-representation. Not so.

Unless error is affirmatively shown in the record, “[t]he general rule is that a trial court is presumed to have been aware of and followed the applicable law.” (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) “Not only does the defendant bear the burden of demonstrating an invalid waiver

of the right to counsel, but the defendant further bears the burden to provide a record on appeal which affirmatively shows that there was an error below, and any uncertainty in the record must be resolved against the defendant.” (*Sullivan, supra*, at pp. 549-550.) Here, rather than suggest the court failed to understand its discretion under *Johnson* and *Edwards*, the record shows the contrary. The trial court stated on the record its intention to research the limitations on the right to self-representation during a break. After the break the court pointed the prosecutor to a treatise and chapter that discusses *Johnson* and *Edwards*.⁴ Following further discussion and questioning, the court “ma[de] the call” that Terry was “able to represent [him]self.” The court unquestionably understood it had the discretion to deny Terry’s request.

Terry’s reliance on *Shiga, supra*, 6 Cal.App. 5th 22 is misplaced. The record there showed the trial court erroneously believed that a finding the defendant was competent to stand trial “ ‘tied’ ” its hands as to the determination whether the defendant was also competent to represent himself. (*Ibid.*) Accordingly, the general rule that the trial court is presumed to have been aware of and followed applicable law was rebutted by an affirmative showing that the court was unaware of its discretion “both to conduct an inquiry regarding whether defendant was mentally incapable of representing himself and, if necessary, to deny defendant’s *Faretta* request on that ground.” (*Id.* at p. 40.)

The facts here are different. The record clearly reflects the trial court knew the relevant law and understood its role to determine whether Terry was competent to act without an attorney at trial. Terry isolates a few of the court’s remarks at the hearing out of context to argue it mistakenly conflated competence to self-represent with competence to stand trial, but his argument is belied by any fair reading of the hearing transcript. This record leaves no doubt that the court understood and exercised its discretion under *Johnson* and *Edwards*.

⁴ Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2016) § 3.7, p. 57 [“A defendant who has been found competent to stand trial may not be competent to conduct the trial proceedings by himself or herself and may be denied the right to self-representation”]; see also Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2015) § 3.7, p. 57 [same].).

II. The Court Properly Denied Terry’s Mid-Trial Request for Counsel

Terry contends the court abused its discretion when it denied his later request for appointment of trial counsel. This contention is also meritless.

A. Background

The jury was sworn in on April 3, 2017. The prosecutor made his opening statement and called Suzanne as his first witness.⁵ After the prosecutor questioned her for some time, Terry told the court he wanted an attorney because “a lot of people, even the psychiatrist told me I’m stupid for representing myself.”

The prosecutor opposed the request as untimely. The court noted, “We are in the middle of the victim testifying. I have gone over this issue with you copiously and many times, Mr. Terry. . . . I have had numerous court appearances between the time I granted the motion just to check in with you and make sure everything was going okay and that you hadn’t changed your mind.” The court also noted that jeopardy had attached, but again deferred a ruling until it could research the issue.

Before the end of that day and again the following morning, Terry confirmed that he was still requesting counsel. He did not have an attorney who could step in right away and was “not talking to” his former lawyer, Mr. Roberts, whom he said was not “looking out for [his] best interest.” Reviewing the history of the case, the court observed it had been set for trial and continued numerous times over three years, mostly by the defense. In December 2016, the court denied Terry’s *Marsden*⁶ motion to replace attorney Roberts, and about two weeks later Terry made the *Faretta* motion that was granted after the court explained the risks of self-representation. After granting the motion the court continued the case until March to give Terry time to prepare for trial. In the interim it held hearings and readiness conferences on January 24, January 30, February 15, March 2 and March 10. At each of those hearings the court asked Terry if he was still comfortable representing himself. The parties subsequently argued in limine motions, the jury was

⁵ Terry elected to defer his opening.

⁶ *People v. Marsden* (1970) 2 Cal.2d 118.

selected and sworn, the court read the information, the prosecutor gave his opening statement, and both victims testified.

The court denied Terry's motion. It noted that the case was in trial after numerous continuances, that Terry changed his mind about representing himself because people were telling him it was not a good idea, that he had no attorney ready to step in and did not want Roberts, the only lawyer who could be ready in a reasonable time, and that he had represented himself appropriately so far. In sum, the court found no good reason for Terry's request for counsel and that granting it would require a lengthy continuance that would significantly inconvenience the jury and witnesses.

B. Analysis

When a self-represented defendant seeks to revoke his self-represented status during trial, a court must consider the totality of the circumstances, including: (1) the defendant's reasons for the request; (2) the delay or disruption likely to be caused to the court, jury, and other parties; (3) the defendant's prior history with respect to counsel, including seeking to substitute counsel; (4) the length and stage of the trial proceedings; and (5) the defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. (*People v. Lawrence* (2009) 46 Cal.4th 186, 192 (*Lawrence*); *People v. Gallego* (1990) 52 Cal.3d 115, 163-164.) The court has broad discretion in ruling on this request. (*Lawrence, supra*, at pp. 192-193.)

The court did not abuse its discretion. When Terry first sought appointment of counsel the court and the parties had already devoted substantial time to jury selection, opening statements, and the prosecutor's direct examination of the main victim in the case. Terry was adamant that he did not want to be represented by his former attorney and had filed an unsuccessful *Marsden* motion before he sought to represent himself. His grounds for seeking counsel were not new or unexpected. The court had expressly warned him it was not a good idea to represent himself and it would be very difficult for him to do so and explained that he could not change his mind merely because he encountered problems arising from the self-representation. As the Supreme Court observed in a similar situation, "Nothing new or unforeseeable had occurred in the

interim. . . . Buyer’s remorse may not be an illegitimate reason for wanting to revoke a *Faretta* waiver, but neither is it a compelling one.” (*Lawrence, supra*, 46 Cal.4th at p. 621; see *People v. Smith* (1980) 109 Cal.App.3d 482, 484-486.) Moreover, a continuance or mistrial would almost certainly have resulted had the court granted Terry’s request and appointed counsel. (See *Lawrence, supra*, 46 Cal.4th at p. 621.) In these circumstances, denial of Terry’s midtrial request to revoke his self-representation was within the court’s discretion.

III. The Sentence Imposed on Count 7 Does Not Violate Section 654

The prosecutor asked the court to impose consecutive sentences on counts 1 (kidnapping for robbery), 4 (robbery) and 7 (possession of a firearm by a felon).⁷ The court agreed, noting that “being a felon in possession of a firearm is a distinct criminal intent and objective from the other counts and I don’t believe that is 654.” Terry contends the court should have stayed the sentence on count 7 because the conduct and objectives underlying the firearm possession offense were “necessarily identical” to the conduct and objectives underlying the robbery and kidnapping. The law is otherwise.

Pursuant to section 654, “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) “Section 654 prohibits punishment for two crimes arising from a single indivisible course of conduct. [Citation.] If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.] The defendant’s intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence.” (*People v.*

⁷ The sentences on the remaining counts were stayed under section 654.

Perry (2007) 154 Cal.App.4th 1521, 1525.) We review the evidence in the light most favorable to the People and presume in support of the judgment the existence of every fact the trier could reasonably deduce from it. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

Case law provides guidance for applying section 654 in the context of a conviction for possession of a prohibited weapon. Its ban on multiple punishment applies where possession of a firearm is incidental to and simultaneous with the primary offense. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1144 (*Jones*).) “[M]ultiple punishment is improper where the evidence ‘demonstrates at most that fortuitous circumstances put the firearm in the defendant’s hand only at the instant of committing another offense’ ” (*Ibid*; see *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412.) “On the other hand, it is clear that multiple punishment is proper where the evidence shows that the defendant possessed the firearm before the crime, with an independent intent. (*Jones, supra*, 103 Cal.App.4th at p. 1144; see also *People v. Wynn* (2010) 184 Cal.App.4th 1210, 1217.) Applying these principles, *Jones* concluded that “section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm” (*id.* at p. 1145) and affirmed the imposition of concurrent sentences for firearm possession by a felon and shooting at an inhabited dwelling. “The record supports the trial court’s implied findings [that the offenses were separate and distinct], because the evidence was sufficient to allow the inference that Jones’s possession of the firearm was antecedent to and separate from the primary offense of shooting at an inhabited dwelling. It strains reason to assume that Jones did not have possession for some period of time before firing shots at the [victim’s] home. Any other interpretation would be patently absurd. Jones committed two separate acts: arming himself with a firearm and shooting at an inhabited dwelling. Jones necessarily had the firearm in his possession *before* he shot at [the victim’s] house. . . . It was therefore a reasonable inference that Jones’s possession of the firearm was antecedent to the primary crime.” (*Id.* at p. 1147.)

Application of these principles compels the same result here. It is a logical inference from the evidence that Terry arrived at the scene of the shootings already possessing a firearm. Indeed, Terry concedes that he “appears to have possessed a gun prior to carrying out the crimes in this case.” The jury’s additional finding that he personally used the firearm while committing the substantive offenses in no way undermines that inference. In these circumstances the trial court correctly found section 654 inapplicable.

IV.Sentencing Errors

The court sentenced Terry to an indeterminate term of 77 years to life plus a determinate term of 82 years. The abstract of judgment reflects an indeterminate term of 100 years to life plus a 120-year determinate term. The parties agree, correctly, that the judgment must be modified to correct the following sentencing errors.

The court stayed the sentences on counts three, five and six under section 654. However, the abstract of judgment incorrectly reflects a 25-year-to-life unstayed sentence on count three, an unstayed 20-year enhancement imposed on count three under section 12022.53, subdivision (c), and two 5-year enhancements imposed for count three under section 667, subdivision (a)(1). The abstract must be corrected to reflect that these are stayed pursuant to section 654.

The abstract of judgment also reflects errors in the terms imposed for counts four and seven. In articulating Terry’s sentence, the court stated it was selecting the aggravated determinate term of five years for count four and the aggravated determinate term of three years for count seven. The court also imposed consecutive 25 years to life sentences on counts four and seven under the three strikes law, plus enhancements. The abstract of judgment erroneously lists Terry as receiving *both* the determinate term and the indeterminate term for each of these counts. The parties acknowledge that this was erroneous. “The Three Strikes law is a penalty provision, not an enhancement. It is not an enhancement because it does not add an additional term of imprisonment to the base term. Instead, it provides for an alternate sentence (25 years to life) when it is proven that the defendant has suffered at least two prior serious felony convictions.” (*People v.*

Williams (2014) 227 Cal.App.4th 733, 744.) The abstract must be corrected to eliminate the determinate terms.

In addition, the parties have correctly identified errors in the indeterminate terms imposed on counts one and four. On count four the court imposed a total sentence of 55 years to life, consisting of a 25 years to life indeterminate base term plus 30 years of enhancements. This was erroneous. Under section 1170.12, subdivision (c)(2)(A), the court was required to select as the minimum term that must be served for the indeterminate life sentence the greatest of three alternatives: three times the term otherwise provided for the current conviction (subd. (c)(2)(A)(i)); 25 years (subd. (c)(2)(A)(ii); or the term selected for the current conviction plus any applicable enhancements (subd. (c)(2)(a)(iii)). In this case the greatest term results from applying subdivision (c)(2)(A)(iii). Calculated under this provision, it consists of five years for the substantive offense, 20 years for a section 12022.53 firearm enhancement, 10 years for two section 667, subdivision (a) serious felony enhancements, and one year for a section 667.5, subdivision (b) prison prior enhancement, for a total indeterminate term of 36 years to life. The judgment must be modified and the abstract of judgment corrected accordingly.

On count one, kidnapping for robbery, the court sentenced Terry to an indeterminate term of 27 years to life under section 1170.12, subdivision (c)(2)(A)(iii).⁸ The term should be 38 years to life. Kidnapping for robbery is ordinarily punishable by life in prison with the possibility of parole. (§ 209, subd. (b)(1).) Under section 1170.12, subdivision (c)(2)(A)(iii), the minimum indeterminate term for the offense is determined using the period prescribed by section 3046—here, seven years.⁹ (§ 3046, subd. (a).)

⁸ The abstract of judgment indicates a term of 25 years to life.

⁹ Section 1170.12, subdivision (c)(2)(A)(iii) provides “Except as provided in Subparagraph (C), if a defendant has two or more prior serious and/or violent felony convictions, as defined in subdivision (b), that have been pled and proved, the term for the concurrent felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of: [¶] [¶] . . .

Accordingly, the minimum term for count one is seven years, plus 20 years for the section 1022.53 firearm enhancement, 10 years for two serious felony enhancements, and one year for a prison prior enhancement, for a total of 38 years to life. (See *People v. Miranda* (2011) 192 Cal.App.4th 398, 417.)

Finally, the court sentenced Terry to one year each for his two prior prison terms under section 667.5, subdivision (b), and added the two years to his aggregate determinate term. The abstract of judgment does not reflect these enhancements. In any event, the correct calculation, as follows, results in the addition of three years, not two, to Terry's determinate term. Terry had four serious felony convictions—one robbery conviction from 1992 resulting in prison prior number 1, and three robbery convictions tried together in 1992 resulting in prison prior number 2. The court properly imposed five-year terms (per current count, see *People v. Williams* (2004) 34 Cal.4th 397, 405 (*Williams*)) for only *two* of Terry's four serious prior felonies—one for the 1992 offense and one for one of the three 2001 offenses—because section 667, subdivision (a)(1) specifies that serious felony convictions must have been brought and tried separately to qualify for the five-year enhancement.¹⁰ Under *Williams* the one-year terms for the prison priors should also be imposed per count. However, *People v. Jones* (1993) 5 Cal.4th 1142, 1144-1145) bars the imposition of five-year and one-year terms for the same prior offense and resulting prison term. Accordingly, the prior prison term enhancement for Terry's 1992 robbery should be stayed. (See *People v. Brewer* (2014)

the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170 of Title 7 of Part 2, or any period prescribed by Section 190 or 3046." Under section 3046, subdivision (a), "An inmate imprisoned under a life sentence shall not be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole."

¹⁰ "Any person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by a court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." (§ 667, subd. (a)(1.)

225 Cal.App.4th 98, 105-105 [staying, rather than striking, lesser enhancements].) A one-year prison prior enhancement may be imposed for the term Terry served for his 2001 offenses because that term was based on three serious felony offenses, only one of which was used to impose the five-year enhancement. (*People v. Perez* (1992) 4 Cal.App.4th 893, 910; *People v. Irvin* (1991) 230 Cal.App.3d 180, 189; *People v. Medina* (1988) 206 Cal.App.3d 986, 989-992.)

The upshot of all of this is that the judgment and abstract of judgment must be modified to reflect an indeterminate term of 99 years to life and a determinate term of 83 years. The indeterminate term comprises a term of 38 years to life on count one, a consecutive term of 36 years to life on count four, and a consecutive 25 years to life term on count seven. The determinate term comprises a 20-year term for each of the firearm enhancements on counts one and four (§ 12022.5, subdivision (c)); one 10-year firearm enhancement on count seven (§ 12022.5, subd. (a)); two 5-year terms each for counts one, four and seven (§ 667, subd. (a)); and a one one-year term each for counts one, four and seven (§ 667.5, subd.(b).) Terry agrees that these calculations are correct. The abstract of judgment must also be corrected to reflect that the sentence on count three was stayed in its entirety and to delete the determinate terms for counts four and seven.

V. Remand for Reconsideration of Enhancements is Unnecessary

Terry asserts we must remand his case to the trial court for resentencing in light of recent legislation, effective after he was sentenced, that gives the trial court discretion to strike firearms and serious felony enhancements in the interest of justice. (See § 12022.53, subd. (h), as amended by Stats. 2017 ch. 682 (S.B. 620); § 12022.5, subd. (c), as amended by Stats. 2017, ch. 682 (S.B. 620); § 1385, subd. (b), as amended by Stats. 2018, ch. 1013 (S.B. 1393); see *People v. Woods* (2018) 19 Cal.App.5th 1080, 1091 [retroactive application].) We disagree. The record shows the trial court would not have stricken the enhancements had it the discretion to do so at sentencing. (E.g., *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

Before pronouncing sentence, the trial court denied Terry's *Romero*¹¹ motion to dismiss one or more of his prior strike convictions. The court reasoned as follows. "[W]hen I look at the nature and circumstances of the prior strike convictions, I note that there is one 211, one robbery case in 1992, that is skipping the juvenile robbery that Mr. Terry, you are convicted of. But just for purposes of this analysis, on 3-14-92 you were sentenced to three years in the California Department of Corrections. You were paroled on 10-29-93. You had three parole violations and were returned to prison. Then again you had three robbery convictions in close proximity, but three separate and distinct robberies on 2-10 of '99, 2-16 of '99 and 3-29 of '99. That happened to be the same victim, but those three robberies occurred with a gun. You were convicted of three counts of robbery causing great bodily injury and a 12022.53, personal use of a firearm. As of that date in 1999 you were [sentenced] to 17 years in prison. And then you were released on June 28th, 2014, and a mere 12 days later you committed the current offenses.

"I note when I read the probation report, because that's my source of information regarding the prior incidences, they are very similar to what we have here. You went into a business with a gun to rob a store. We don't know a lot of the particulars, but we can assume while these are remote, this is not a single period of abhorrent behavior on your part, and there are no multiple convictions that arose from the same act. And while there are no comments from the victims in the prior incidences, that circumstance, it is not hard to imagine that that is an unfathomable thing to experience. So your record is long and it is very serious. Your history shows a pattern of violence. I don't see any indication of drug addiction or other explanation for the—that would in any way diminish, let alone excuse, the behavior. And in this particular offense the acts that were engaged in on that day were even more serious than the prior incidences. You do have sufficient age, being in your mid forties at this time. You have family relationships that are good. You have good health. But it is absolutely not in the interest of justice to strike the prior strikes

¹¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

because of the nature of the prior offenses and the current offense, the similarities, the fact that you were out for 12 days, and it does seem that you are the type of recidivist offender that is contemplated by the three strikes law.”

In light of these comments, it is plain that the court intended to sentence Terry to the maximum term permitted by law and, therefore, would not have exercised its discretion to lessen Terry’s sentence by striking his firearm or serious felony enhancements.¹² Accordingly, a remand for reconsideration in light of the recent amendments is unnecessary.

DISPOSITION

The judgment is modified and the abstract of judgment is ordered corrected to reflect an indeterminate term of 99 years to life and a determinate term of 83 years as specified in part IV of this opinion. The abstract of judgment must be corrected to reflect that the sentence on count three was stayed in its entirety and to delete the determinate terms for counts four and seven.

¹² As noted in Terry’s unsuccessful *Romero* motion, “Even if the court exercises its discretion and strikes Mr. Terry’s strikes, he is still likely to be incarcerated until he is a very old man.”

Siggins, P.J.

WE CONCUR:

Petrou, J.

Wiseman, J.*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.